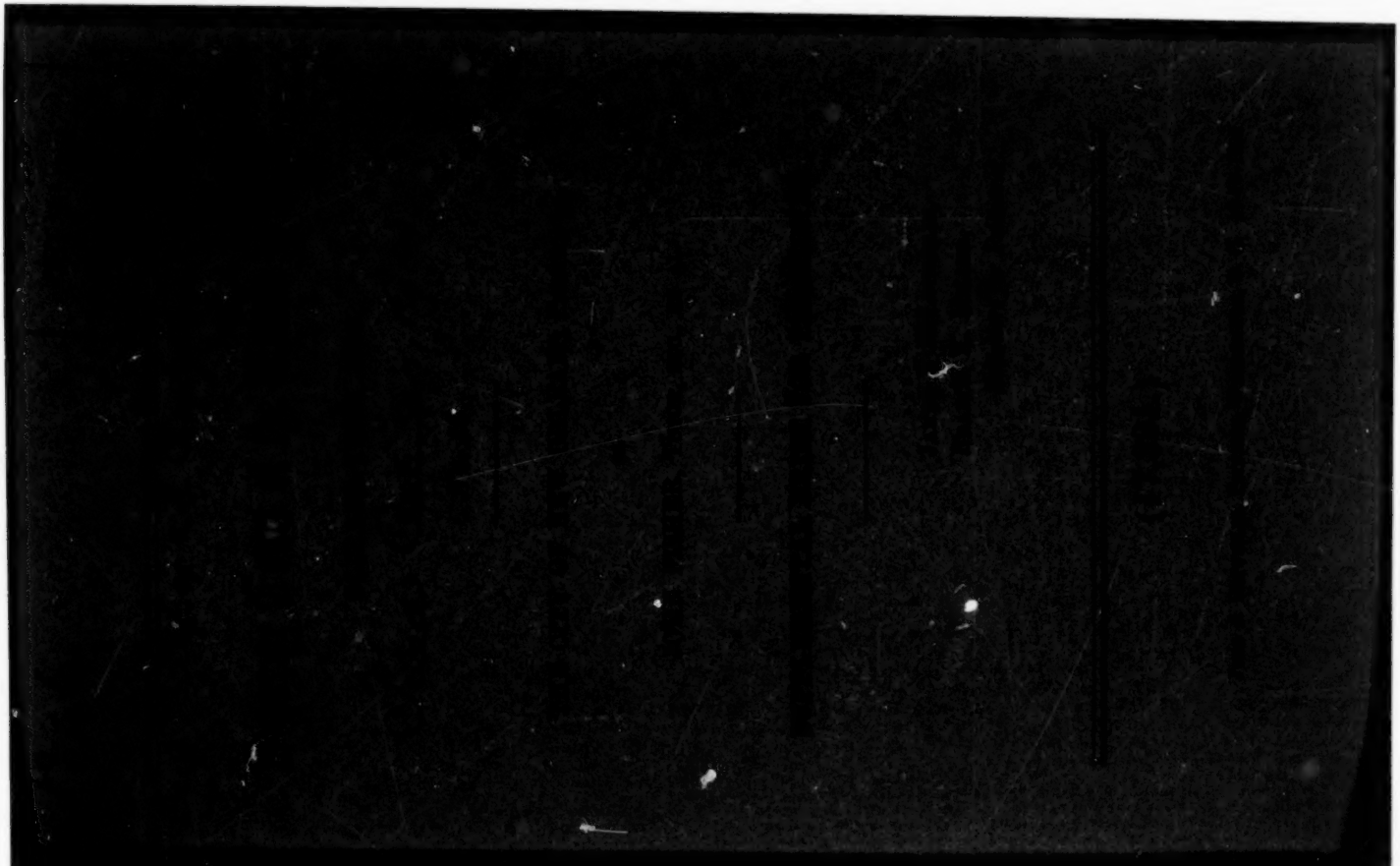

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 46.

THE CITY OF NEW ORLEANS, PETITIONER,

against

JOHN FISHER, TUTOR, &C., ET AL.

Supplemental Brief for Petitioner, The City of New Orleans.

I.

In the brief and oral argument of the Respondent in this Court, it was for the first time attempted to sustain the jurisdiction of the Circuit Court, on the ground that the present proceeding was ancillary to the original suit of Fisher *vs.* School Board; the case was conducted in the two courts *a qua* upon the theory that federal jurisdiction was found solely in the diverse citizenship of the parties.

It is quite clear, however, that the present suit is in no

sense auxiliary or supplemental to the former litigation, in such sense, as to make it an incident or continuation thereof; we have here a new defendant, the City of New Orleans, a stranger to the original record, between whom and Respondent there is raised new issues, forming no part of the original controversy with the School Board, and which in point of fact could find no place in the first suit, which was based upon entirely different and independent grounds, met by defenses which would be wholly irrelevant here, and closed by a judgment or decree which determined nothing as to the present defendant; all issues found in the present record were left at large, were in fact touched at no point by the original decree.

In a case of this character it should appear from the averments of Respondent's bill, that the matters exploited, had already been litigated in the Circuit Court by the same parties, otherwise there would be no jurisdiction.

Garland & Ralston's Federal Practice, s. 132, p. 172.

Respondent seeks here to provoke new issues, to be litigated and adjudged, and to bind by new proceedings, a party unknown to the original record; this suit cannot be considered as necessarily ancillary to, or as a mode of relief inseparably connected with the other suit; it involves the investigation of a new case, arising upon new facts, and is directed against a party not joined in the original action, or bound by the decree therein rendered, in the same manner and to the same extent as the defendant therein; the present defendant, the City of New Orleans, raises here no issue which was mooted or adjudicated upon, in the other suit which was directed against the School Board alone;

the issues here are new and original, and not only did not, but could not, have formed any part of the matters contested or determined in the former suit; the presence of the City of New Orleans as a defendant in the original action, would have been absolutely necessary to have created this condition; the School Board was sued in the first case, and judgment was rendered against it alone; whether or not the City was indebted to the Board, and if it were, what was the measure of Respondent's rights, growing out of such fact were left open, as questions undecided by the original decree, and of necessity, could not be adjudicated upon, save in an original, separate and independent suit, to which the City was made, as she is here, a party defendant; the present proceeding is not merely a mode of execution or relief by which the Respondent is to enforce the former decree in favor of his deceased wife; it is an independent controversy, with a new and a different party, for the purposes of ascertaining whether such conditions exist, as make it liable to Respondent, for the collection of the debt which he claims; the City, here, is entitled to make special and independent defenses regarding itself; and the right to do so is in no respect diminished or controlled by the former decree in which the School Board was cast.

There are adjudicated cases in the federal courts, which maintain the principles contended by defendant as governing the present controversy.

In Anglo-Florida *vs.* McKibbon, 65 Fed. Rep., 529, complainant obtained a judgment decreeing him to be a partner of certain persons in certain lands. By supplemental bill he endeavored to annul conveyances of the lands in which he was decreed to have an interest, alien-

ated by his partner, making the purchasers of the property defendants. It will be seen that the proceeding was to give the former decree its full effect and to secure to complainant the benefit of his title thereby established. The defendants in the supplemental bill were citizens of the same State as complainant, and on demurrer to the jurisdiction, it was held by the Court of Appeals of the Fifth Circuit that the case fell within no rule applicable to supplementary bills as concerned a defendant of the same citizenship of complainant; that new defendants were brought in, and new matter charged as a basis and ground of relief which was not litigated in the first suit, by the same parties, standing in the same interests.

In Lackawanna Coal & Iron Company *vs.* Bates, 56 Fed. Rep., p. 734, it was held by the Circuit Court for the Western District of Missouri, Philips, Judge, that a proceeding under a state statute, to hold a stockholder upon a judgment against a corporation, upon which there had been a return of *nulla bona*, was removable from the state to a federal court, because it was a suit within the meaning of the judiciary, and not ancillary to or in aid of the execution of the first judgment, and could not be regarded as a continuation of the proceeding on the latter; that the proceeding against the stockholder was an independent suit, and not a mere sequence or dependency as a means of enforcing the judgment against the corporation, the state court having held such to be the proper construction of the state statute; it was also held by the latter court, that the process was in the nature of a suit in equity to reach assets in the hands of a third person, and was an independent original action, to be treated independently of the cause

against the corporation, with the right of trial, appeal and writ of error, as in any other action at law.

The Circuit Court asks, why should not the defendant, called into court by process to litigate the question as to whether or not he is a stockholder, and the extent of his liability, be entitled to his constitutional right as a non-resident to have his cause tried in the federal court?

In Boyd, Administrator, *vs.* Braddish *et al.*, 10 Fed. Rep., 406, in the Circuit Court for the District of Iowa, the plaintiff, a citizen of Wisconsin, obtained in the State Court a judgment against an Iowa corporation, and having failed to obtain satisfaction of the judgment, proceeded against the defendant, a stockholder in the corporation, under the Iowa statute, which made the shareholder liable for corporate debts under certain conditions; the defendant sought to remove the case from the State to the Federal Court; he was opposed on the ground that the proceeding was supplemental to the original suit, of which it was a mere mode of execution or relief, inseparably connected with the original judgment; but it was held that the process was not a mere mode of execution or relief, but involved an independent controversy, with a new or different party; that it did not aim to reach assets of the corporation in the hands of a stockholder; that it sought no relief which was inseparably connected with the judgment against the corporation; that the petition charged certain fraudulent acts against the stockholders; which under the statute made them liable for the judgment; that this was a distinct and independent cause of action; that the plaintiff's allegations were founded upon facts which he claimed brought him within the terms of the statute;

that it might have been necessary for him to set out the judgment, and to show that an execution had been unsatisfied, to meet the conditions of the statute, but that the judgment was not the foundation of his action; that he had a controversy with new parties, distinct from that upon which the judgment was rendered; that he sought to establish a new liability against these new parties.

The application of this case to the present controversy is direct. There the remedy for the enforcement of the judgment depended upon the necessary conditions under the statute to make out a cause of liability of a person no party to the original judgment. It was not a process to reach property or assets belonging to the original debtor, but to enforce the judgment against a third party, under the terms of a statute, upon a distinct and independent cause of action which it gave.

If, in the cited case, a proceeding to obtain satisfaction of a judgment by a person no party to it, under the provisions of a statute, is not an ancillary proceeding a mere accessory to the original judgment, but a distinct and independent cause of action, and hence removable from the State to the Federal Court, the present case, which conforms to all of these conditions, should be considered the same.

In Pettus *vs.* Georgia, etc., R. R., 3 Woods, 620 (Case 11,048, Vol. 19, Federal Cases, p. 396 *et seq.*), plaintiff and others brought suit to enforce a lien on certain railroad property; the lien was established by final decree; whereupon the purchasers of the railroad property bought up the claims of complainants, and other claims entitled to the benefit of the decree; counsel for complainants receiving no compensation for their services; whereupon they

filed their petition, entitled of the original cause, in the Court, which had rendered the decree in the original cause, against the purchasers of the property, to establish a lien on the latter for their fee, the defendants sought to remove this proceeding to the Federal Court, but were resisted on the ground that it was a mere incidental proceeding, and appendage or graft upon a suit still pending in the State Court; it was held by Judge Woods that there were here all the elements of an original bill in equity; that the case might have been brought as an independent suit; that it has its origin in the original case, but was not a part of it, or dependent on it; that it was a suit in equity between new parties, on a new cause of action, and consequently was removable.

An ancillary proceeding in the federal court has been determined as equivalent to a supplemental bill; a supplemental bill can be brought only where the subject-matter and the parties are the same in both proceedings.

Root *vs.* Woolworth, 150 U. S., 411.

Where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind, on a different principle, the latter being the province of a bill of review.

Story's Equity Proceedings, 9th Ed., par. 338.

See also Mexican Ore Co. *vs.* Mexican Guadalupe Co., 42 Fed. Rep., 351.

In Bondurant *vs.* Watson, 103 U. S., 286 *et seq.*, plaintiff enjoined the execution of the judgment as concerned

certain property which belonged to him; it was contended that the injunction suit was merely ancillary and incidental to the one in which the judgment had been obtained, and hence not removable from the State court to the Federal Court; in disposing of this contention the Court said that the case removed had all the elements of a suit in equity; when transferred to the Circuit Court an answer and replication were filed, testimony was taken, and a decree made upon final hearing according to equity practice; the original cause to which the plaintiff in injunction was no party, had been ended by a final judgment; that the injunction suit had its origin in that judgment, but was a new and independent suit between other parties, and upon new issues; it was a suit in which the plaintiff sought to be protected against a judgment to which he was not a party, by which his property had been specially condemned to be sold to satisfy a claim against others, and not against him.

These authorities would seem to settle beyond question, that the present suit, raising, as it does, new and original issues, against a new defendant, for the purpose of obtaining relief of a special character, in nowise definable as the execution of a judgment as ordinarily understood, is an independent original action.

In no event, however, could the ancillary jurisdiction of the Circuit Court be invoked further than to obtain the exercise of its powers, for the enforcement of its own judgment; the Complainant sets out in her bill, (Record, p. 1), that she seeks to obtain the execution of three certain judgments in her favor against the School Board; that one of these judgments was rendered in the Circuit Court and the other two by the Civil District Court for the Parish of Orleans, a

tribunal of the State of Louisiana; as to these two latter judgments there could be no ancillary jurisdiction in the Circuit Court; so that should all the contentions of defendant, upon this branch of the case, be met with an adverse conclusion, there would still be no power in the Circuit Court to execute the two judgments of the state court, or to admit them to the benefits of the decree herein.

II.

But, should the Court be of opinion that this suit is auxiliary, or ancillary, to Fisher *vs.* the School Board, then the same defect of jurisdiction which is set up in the present matter is equally applicable to the former case; it may be asked, whether this court can, at this time, inquire into the jurisdiction in the former case, to which, however, it may be replied, that wherever a party seeks the aid of a court of equity to enforce either a judgment at law, or a decree in equity, he does so, at the risk of being called upon to maintain, the validity of the judgment or decree which he thus seeks to enforce; this seems to have been affirmed by your Honors, at least on two different occasions.

Lawrence Mfg. Co. *vs.* Janesville Mills, 138 U. S., 552.
Gay *vs.* Parpart, 106 U. S., 679.

See also opinion of the Supreme Court of Illinois in the last-mentioned case, reported as Wadhaus *vs.* Gay, 73 Ill. Reports, 415; also Daniels' Chancery Pleading and Practice, 6th American edition, top paging 1586, especially note (*a*); 50 N. J. Equity, 97.

It is shown by the record that Mrs. Fisher, the original

complainant and alleged creditor of the School Board, was a native of Virginia; that at an early age she removed to the City of New Orleans, where she resided for a period of thirty-eight years, up to her death; that her husband, John Fisher, appearing now as the natural tutor or guardian of his children, the issue of his marriage with his said wife, claimed first to have been a subject of the King of Spain, but upon second thought, concluded that he was a British subject; Mrs. Fisher did not by her marriage necessarily cease to be a citizen of the United States, or of the state in which she resided.

Morse on Citizenship, pp. 139, 142, 144.

A citizen, in the sense of the judiciary acts, is one who resides in, and is an inhabitant of, the state in question; in any event one who has resided in a state for a considerable time may be considered a citizen thereof.

Shelton *vs.* Tiffin, 6 How., 163.

There is sufficient in the record to show, that at the time and during the pendency of Mrs. Fisher's suit against the School Board, she was a citizen of Louisiana, and therefore incompetent to maintain in the Circuit Court a suit against the School Board, a corporation created by the laws of, and domiciled in the same state; if such be the fact, and it is abundantly shown by the record there was no jurisdiction of the original case; that your Honors are at liberty to notice this fact, and in your discretion act upon it, we think is demonstrated by the authorities above cited; the Court may inquire into the status and condition of the parties to the original record, and refuse its aid in the execution of the

former decree, if it is deemed proper to do so; especially, if the question had been before it originally, it would not have made the decree which is sought to execute.

See Lawrence Mfg. Co. *v.* Janesville, and Gay *v.* Parpart, above cited.

III.

A striking feature of the instance case, is the effort of the plaintiff to show an indebtedness of the City to the School Board, which is denied not only by the asserted debtor, but likewise by its supposed creditor, the School Board; the latter in its answer (see Record, p. 17) expressly denies any indebtedness to it by the City; this, however, is of less importance than the original plaintiff's own conduct with reference to the subject-matter of the present controversy, by which she herself has in effect affirmed that all indebtedness by the City to the Board, had been discharged, long prior to the institution of the present suit. It will be seen (Record, p. 103 *et seq.*) that in 1894 Mrs. Fisher upon one of the judgments upon which the present decree in her favor is founded, proceeded by way of garnishment process against the City, as the supposed debtor of her judgment debtor, the School Board; the answers of the City to the interrogatories in garnishment, (see Record, p. 106), disclosed that she owed the School Board $1,893.09; that this sum was received by Mrs. Fisher as showing the full measure of the indebtedness due by the City to the Board; the answers of the garnishee were never traversed but on the contrary acquiesced in and affirmed to be true by the acceptance by Mrs. Fisher of

the sum of money which they disclosed being due to the School Board; under Act No. 27 (Acts 1877, p. 45) of the General Assembly of Louisiana, for the year 1877, a party who under a writ of execution, proceeds against a third person as garnishee, has only twenty judicial days, within which to traverse or contradict the answers of the latter; no attempt was made by Mrs. Fisher to show that the City was indebted to the School Board in a larger sum than was disclosed by her answers; her procedure was the reverse of this; she accepted without question the indebtedness of the City as being $1,893.09, and no more; the failure to contradict the City's answers, closed all question as to the amount which she may have owed the School Board on July 26th, 1894, the date when her answers were filed in Court (Record, page 106); there is nothiug here to show what, if any, indebtedness arose subsequent to that date; surely nothing which has the faintest tendency to show that subsequent to July 26th, 1894, the City became the debtor of the enormous sum of money for which she is cast by the judgment in the Court below.

The city retained the interest on the school taxes, with the consent and approval of the School Board; this course was concurred in for years; plaintiff should not be permitted to set aside, the settlement of the taxes, thus effected, especially in the absence of any charge of fraud or collusion.

Respectfully submitted.

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